

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

FEB 24 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FIVE POINTS HOTEL PARTNERSHIP,)
an Arizona partnership; and PARAGON)
HOTEL CORPORATION, a Delaware)
corporation,)

Plaintiffs/Appellees,)

v.)

RAY and PATRICIA PACIONI, husband)
and wife; and THE ESTATE OF VIRGIL)
KOENIG,)

Defendants/Appellants.)

2 CA-CV 2010-0117

2 CA-CV 2010-0119

(Consolidated)

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200501706

Honorable Robert Carter Olson, Judge

AFFIRMED

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and

E C K E R S T R O M, Judge.

¶1 Defendants/appellants Ray and Patricia Pacioni and the estate of Virgil Koenig appeal from the jury verdicts in favor of plaintiffs/appellees Five Points Hotel Partnership and its managing partner Paragon Hotel Corporation (collectively “Five Points”). Pacioni and Koenig argue there was insufficient evidence supporting the jury’s verdicts and the trial court erred by admitting prejudicial evidence and denying their motion for judgment as a matter of law. They also contend they are entitled to offset against the judgment the amount Paragon owes them as part of a settlement agreement. For the following reasons, we affirm the judgment.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to upholding the jury’s verdict.” *Desert Mountain Props. Ltd. P’ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, n.1, 236 P.3d 421, 425 n.1 (App. 2010). Paragon, Pacioni, and Koenig were partners in the Five Points Hotel Partnership.¹ Five Points sold its sole asset, a hotel in Casa Grande, Arizona, to Casa Grande Resort Living (CGRL) for \$3.8 million, with the understanding that CGRL planned to resell the hotel as soon as possible. The parties agreed that CGRL would assume the bond debt on the property as payment in the initial

¹Virgil Koenig died in 2006 before Five Points filed its amended complaint against him.

closing and would then conduct a “second closing” to reconcile the bond reserve accounts and operating accounts for the hotel and pay Five Points any remaining funds.

¶3 A few months after the initial closing between Five Points and CGRL, CGRL sold the hotel to Peter Nagra for \$6.1 million. Five Points unsuccessfully attempted to engage CGRL in the second closing and eventually filed a complaint, alleging CGRL would have owed it approximately \$300,000 from a reconciliation of accounts after the hotel’s resale. During discovery, Five Points learned that Pacioni and Koenig had received almost \$300,000 in “consulting fees” from CGRL as part of the resale of the hotel to Nagra. In an amended complaint, Five Points added Pacioni and Koenig as defendants and alleged they had breached their fiduciary duties to the partnership and the other partners by taking the fees from CGRL.²

¶4 Five Points’ claims against Pacioni, Koenig, and CGRL proceeded to trial. About two weeks before trial was scheduled to begin, counsel for CGRL moved to withdraw from the case. Then, at a pretrial hearing, CGRL confirmed it would not participate in the trial and would no longer defend the claims against it. As a result, the trial court granted judgment against CGRL and ordered it to pay \$300,000 in damages to Five Points following a brief bench trial. After a four-day jury trial, verdicts were returned in favor of Five Points and against the other defendants that awarded Five Points

²Five Points also alleged a claim of breach of fiduciary duty against the title company that handled the escrow of both sales of the hotel, and claims of fraud and negligent misrepresentation against Joe Pinsonneault, the managing member of CGRL. Those claims were dismissed by summary judgment and are not part of this appeal.

\$284,266.46 in damages, the total amount of the consulting fees paid to Pacioni and Koenig. This appeal followed.³

Discussion

Sufficiency of Evidence

¶5 Pacioni and Koenig argue “there was insufficient evidence from which the jury could have found that Mr. Pacioni and Mr. Koenig usurped a partnership opportunity.” However, the usurpation of a partnership opportunity is only one of the ways that a partner can violate the duty of loyalty. A partner’s duty of loyalty requires him:

1. To account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity.
2. To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.
3. To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

A.R.S. § 29-1034(B)(1)-(3); *accord DeSantis v. Dixon*, 72 Ariz. 345, 350, 236 P.2d 38, 41 (1951) (duty of loyalty imposes upon partner obligation “of acting for the common benefit of all the partners in all transactions relating to the firm business, and of refraining

³Five Points’ appeal arising from the same transaction has been bifurcated from this appeal pursuant to Five Points’ motion.

from taking any advantage of one another by the slightest misrepresentation, concealment, threat or adverse pressure of any kind”) (citation omitted).

¶6 Pacioni and Koenig stipulated that, while partners in Five Points, they received \$284,266.46 in payments from CGRL that came from the escrow of the resale of the hotel to Nagra, which they did not disclose to the partnership. Based on those facts and the other evidence presented, a reasonable jury could have found Pacioni and Koenig had breached their duty of loyalty under § 29-1034(B)(1) by failing to account for a benefit they derived in the conduct or winding up of the partnership business. Pacioni and Koenig have not argued the jury’s verdict is unsupported on this ground, nor have they provided any authority for that proposition. Moreover, they did not request special verdict forms for the jury, and “[w]e will ‘uphold a general verdict if evidence on any one count, issue or theory sustains the verdict.’”⁴ *Mullin v. Brown*, 210 Ariz. 545, ¶ 24, 115 P.3d 139, 145 (App. 2005), *quoting* *Murcott v. Best W. Int’l, Inc.*, 198 Ariz. 349, ¶ 64, 9 P.3d 1088, 1100 (App. 2000). Accordingly, we will not disturb the jury’s verdicts on the ground of insufficient evidence.⁵

⁴Pacioni and Koenig also contend the jury verdict is unsupported by the evidence to the extent the jury found the money they received is a “partnership asset,” that they provided services to CGRL in exchange for the payment, or that the money had been intended as a payment to the partnership. But they have failed to support these contentions with any authority. And regardless, because we have found sufficient evidence of one of the grounds to support the finding of a breach of fiduciary duty, we need not address each potential alternative ground for the verdict. *See Mullin*, 210 Ariz. 545, ¶ 24, 115 P.3d at 145.

⁵Pacioni and Koenig contend Five Points’ argument at trial that the partners had to prove the money was a gift from Pinsonneault in order to prevail “impermissibly reversed the burden of proof and confused the jury” and “invited the jury to decide the case on an

Admissibility of Judgment Against CGRL

¶7 We will affirm a trial court’s rulings on the admission of evidence “unless a clear abuse of discretion appears and prejudice results.” *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996). Pacioni and Koenig argue the trial court erred by admitting as evidence “the judgment against [CGRL] based upon a post litigation reconciliation accounting, which showed the amount claimed by [Five Points] from [CGRL] was nearly the same as the amount [CGRL] paid to Pacioni and Koenig. But Pacioni and Koenig have mischaracterized the evidence that was actually presented to the jury.”⁶

¶8 First, they contend they “sought to preclude any reference to the so-called second closing,” but they acknowledged to the trial court that limited evidence about the second closing was relevant to explain the context of the transaction between the partners and CGRL. Second, they contend the jury heard evidence that a judgment had been entered against CGRL, but the trial court excluded such evidence in its order setting forth the parameters for the evidence of the second closing.

improper premise.” But their lone citation to a portion of Five Points’ closing argument does not support their contention, and they have not further developed the argument. Moreover, because they did not make this argument in the trial court, it is deemed waived on appeal. *See Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 18, 169 P.3d 120, 125 (App. 2007).

⁶In their reply brief, Pacioni and Koenig concede the actual judgment was not admitted and instead argue “the trial court erred in allowing certain evidence of the so-called ‘second closing.’” Arguments made for the first time in a reply brief are waived. *Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005).

¶9 Indeed, Pacioni and Koenig have not shown Five Points violated the court’s order at any point during the trial. In their reply brief, they concede that the judgment against CGRL was not expressly mentioned to the jury. Although they contend the court “allowed [Five Points] to tell the jury that CGRL absolutely owed Five Points \$300,000 . . . without anyone being there to challenge the evidence,” the record does not support their view that Five Points’ argument was improper. Nor have they explained what prevented them from challenging Five Points’ assertion about the amount of debt owed. And, indeed, the jury was specifically instructed not to “determine what the outcome” of the lawsuit against CGRL “was, is, or should be.” We presume jurors follow the court’s instructions, *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 140, 907 P.2d 506, 526 (App. 1995), and Pacioni and Koenig have not rebutted that presumption. We find no abuse of discretion in the admission of evidence.

Judgment as a Matter of Law

¶10 Pacioni and Koenig argue the trial court erred by denying their motion for judgment as a matter of law (JMOL) under Rule 50, Ariz. R. Civ. P. When reviewing the denial of a motion for JMOL, we view the facts in the light most favorable to sustaining the verdict and will affirm the judgment “‘if any substantial evidence exists permitting reasonable persons to reach such a result.’” *Acuna v. Kroack*, 212 Ariz. 104, ¶ 24, 128 P.3d 221, 228 (App. 2006), *quoting Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 13, 961 P.2d 449, 451 (1998). In challenging the judgment, the appellants rely on the court’s statements that it was “concerned by this verdict on several grounds,” and “the amount of the verdicts is only justified if treated as a partnership asset.” However, the court also

stated that “a reasonable jury could reach these verdicts upon a reasonable interpretation of [the] substantial evidence presented at trial.” And, we have already decided sufficient evidence supports each element of the breach of fiduciary duty claims against Pacioni and Koenig. Thus, Pacioni and Koenig have not shown they were entitled to judgment as a matter of law.

Judgment Offset

¶11 Finally, Pacioni and Koenig argue the trial court erred by not awarding them an offset against the judgment for the amounts owed to them under a settlement agreement with Paragon. But Pacioni and Koenig have waived their right to argue they are entitled to an offset on appeal by abandoning the claim in the trial court. *See Arnold v. Cesare*, 137 Ariz. 48, 52, 668 P.2d 891, 895 (App. 1983) (waiver of issue on appeal when “remedy was not sought in the trial court”); *Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970) (“[A] party must timely present his legal theories to the trial court so as to give the trial court an opportunity to rule properly.”).

¶12 Pacioni had indeed asserted a counterclaim in the instant litigation for restitution against Five Points for the money purportedly owed to him under the settlement agreement. But, after the trial court denied his motion for summary judgment on that counterclaim, Pacioni confirmed with the court at a pretrial conference that he would not be trying the issue of the counterclaim in this case.⁷ And, after again raising

⁷As correctly noted by Five Points, Koenig never joined in Pacioni’s counterclaim, although he did list “recoupment and set-off” among the numerous defenses he intended to preserve in his answer. Even assuming this was sufficient to preserve the defense, Koenig presented no evidence at trial to support it.

the offset issue in an oral motion for judgment as a matter of law at the close of Five Points' evidence, Pacioni eventually acknowledged to the court that he would not be "going there," and he did not have a counterclaim.⁸ Notably, the trial court never dismissed Pacioni's counterclaim or granted Five Points judgment on it. Nor did the trial court expressly rule that Koenig could not assert a defense based on the counterclaim. Pacioni and Koenig now reassert on appeal that they are entitled to an offset.

¶13 But, as set forth above, the record amply demonstrates that Pacioni intended to abandon his counterclaim below and therefore never gave the trial court "an opportunity to rule" on the claim after it had originally denied his motion for summary judgment. *Payne*, 12 Ariz. App. at 435, 471 P.2d at 320. The record shows Koenig similarly abandoned his offset defense. Rather than address the procedural status of their counterclaim and defense related to the offset and their respective statements suggesting they had intended to abandon the offset claim, at least in this litigation, Pacioni and Koenig have merely contended in their reply brief that Five Points "was well aware that Pacioni and Koenig believed they were entitled to a reduction of the Judgment based upon the Settlement Agreement between the parties."

¶14 At oral argument, Pacioni asserted that he did not intend to abandon his counterclaim regarding the offset and his statements suggesting otherwise to the trial court were nothing more than acknowledgments of the trial court's previous ruling apparently rejecting his counterclaim. But our record shows that the trial court had previously done nothing more than deny Pacioni's motion for summary judgment on the

⁸Koenig joined in the comments.

counterclaim, a ruling we generally do not review on appeal because it is not a final order. *See Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 584, 937 P.2d 1382, 1390 (App. 1996). And, despite a suggestion by Pacioni’s counsel that the counterclaim had been dismissed, we find no formal order taking such action. Although the trial court’s reasoning in denying summary judgment suggests that the court might have also precluded mention of the offset at trial as part of either a defense or counterclaim, it never expressly so ruled. In this context, we can only view Pacioni’s statements before and during trial as abandoning the offset claim in this litigation.

¶15 Nevertheless, even if the trial court had formally dismissed the offset claim and implicitly precluded the presentation of evidence regarding that claim at trial, we would find no error in that ruling. In its order rejecting Pacioni’s motion for summary judgment, the court observed that the settlement agreement at issue, which arose out of earlier litigation between Five Points, Paragon, and the other partners, provides for a division of the reserve funds and other funds “anticipated” to be available upon the payoff of the bonds in the amount of \$300,000. It also observed that the agreement provides that unless the payoff amount “is received and disbursed as described in Paragraph 9[,] the Plaintiffs in CV200200100[, the prior litigation,] m[a]y continue the pursuit of their case action.” The court concluded that, contrary to Pacioni’s contention, the payoff had not become due when CGRL paid the bonds, and it was not yet due because the proceeds from the funds never became available, “although it was apparently expected that the bonds would be paid and proceeds would become simultaneously available.” The court further found that “if \$300,000 is not paid from the proceeds” of

either the reserve funds or other amounts remaining from the payoff of the subordinate bonds, the agreement “simply returns the parties to the *status quo ante*” in their prior lawsuit. Thus, the court concluded not only that the funds were not yet due, but that the remedy for failure to pay the funds at the appropriate time was the continued pursuit of a separate lawsuit.

¶16 In sum, the trial court essentially concluded that the claim was not yet ripe and was not part of the litigation that is the subject of this appeal. Accordingly, the court did not err when it ultimately concluded that “whether Pacioni and Koenig are entitled to offset their settlement in the earlier lawsuit against these verdicts is not for this Court to decide.”

Disposition

¶17 For the foregoing reasons, we affirm the judgment.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge